

August 10, 1994

MEMORANDUM

SUBJECT: Regional Directive Concerning Enforcement of U.S. EPA-Administered Statutes on American Indian Lands

FROM: John H. Hankinson, Jr.
Regional Administrator

TO: Division and Office Directors
Division and Office Indian Affairs Coordinators

The purpose of this memorandum is to provide Region IV with a directive for the enforcement of U.S. EPA-Administered Statutes on American Indian Lands. The need for this directive arises in response to recent communications sent to American Indian Tribes without adequate coordination among EPA Program Managers, the Office of Regional Counsel, and the Regional Indian Affairs Coordinator.

Background

Region IV's enforcement policy must be consistent with the Agency's 1984 "EPA Policy for the Administration of Environmental Programs on Indian Reservations." This directive commits the Agency to two principles: (1) the federal government shall work with federally-recognized American Indian Tribes on a government-to-government basis, and (2) the federal government shall pursue Indian self-government.

In embracing these principles, the Agency recognized that they were necessary to ensure that federal environmental statutes would be fully implemented on Indian lands. Federal environmental law applies on Indian lands, but EPA's regulatory programs are generally delegated to the states for implementation and enforcement. Indian reservations are governed by sovereign tribal governments which are federally recognized as having executive, legislative and judicial powers. Thus, tribal law operates independently of state law. Therefore, the Agency needed to address the situation whereby states lack the jurisdiction to implement and enforce environmental statutes and regulations on Indian lands.

Since 1984, the Agency has demonstrated a steady increase in Indian activities. Amendments to various environmental statutes, including the Safe Drinking Water Act, the Clean Water Act and the Comprehensive Environmental Response, Compensation and Liability Act, have explicitly enabled EPA to treat qualifying Tribes as states. The Agency has focused on tribal outreach and training, and on developing the necessary internal accommodations for

expanding program operations to include the large number of tribal governments.

Again, the keynote of the EPA Indian Policy is to ensure consideration of tribal interests as the Agency develops policies that affect Indian lands, and to ensure the close involvement of tribal governments in making decisions and managing environmental programs affecting reservation lands. To this end, Region IV's Enforcement Policy for violations of environmental statutes and regulations seeks to maintain tribal sovereignty while fulfilling the Agency's public trust responsibility. In meeting our responsibility, the Region must ensure that:

- Region IV acts to protect the public health of citizens affected by Indian violations;
- Tribal representatives understand the nature and significance of the violation and potential/actual enforcement action that may/will ensue;
- Remediation and/or corrective action schedules and activities required by the enforcement action are reasonable and account for the technical and financial capabilities of the Tribe.
- Technical assistance is provided to the Tribe.

Implementation of the EPA Indian Policy

The EPA Indian Policy of November 8, 1984, severely limits the instances when the Agency will take enforcement action against an Indian Tribe under any statute, providing:

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, on its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely manner.

Administrator Browner has recently reconfirmed this policy directive, indicating her strong commitment to maintaining the current direction of EPA's Indian program activities. Likewise, Region IV's Indian policy must reflect Administrator Browner's commitment.

The Indian Policy Implementation Guidance, also dated November 8, 1984, requires Regions proposing to initiate enforcement actions against facilities owned or managed by an Indian Tribe to first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the General Counsel.

Thus, only when the Federal Government as a whole cannot mitigate a significant threat to human health or the environment by any other means, will U.S. EPA exercise its enforcement authority against an Indian Tribe. If the Region determines that such a threat does exist as a result of an Indian Tribe's activities, the Region must try to address the problem cooperatively with the Tribe and other federal agencies, such as the Bureau of Indian Affairs and Indian Health Service. Only when such options fail to mitigate the threat in a timely manner should the Region consider seeking Headquarters' concurrence to take an enforcement action.

Accordingly, whenever a potential violation of a U.S. EPA-administered statute occurs on American Indian Lands or as a result of an Indian Tribe's activities, the program office should immediately contact the Regional Indian Program Coordinator (Mark Robertson, 562-9639) and the ORC Indian Attorney (Joan Redleaf Durbin, 562-9544), who will coordinate matters with the Tribe and with other agencies and Headquarters as necessary.

Under no circumstances should a program office issue to an Indian Tribe complaints, notices of violations or any other communications discussing potential future actions or penalties without prior concurrence of the ORC Indian Affairs Attorney and the Regional Indian Program Coordinator.

(phone numbers corrected to Atlanta Federal Center numbers from those in original document.)